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No.

In the Supreme Court of the United States

OCTOBER TERM 1984

STEVE GANN and CHRISTINE GANN

Appellants

vs.

CITY OF PORTLAND

Respondents

On Writ of Certiorari to the Court of Appeals of the State of Oregon.

PETITION FOR WRIT OF CERTIORARI

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6/7/85

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THE QUESTIONS PRESENTED FOR REVIEW

I.

Does the Repondent's failure to follow procedures, required by ORS 197.175(2)(a) and 197.835(4) combined with L.C.D.C. Statewide goals Nos. 1 & 2 taken in conjunction with the Respondent's Comprehension Land Use Plan, in amending its comprehensive land use plan pursuant to a quasi-judicial proceeding violate Petitioner's right to due process of law as

guaranteed by the Fourteenth Amendment to the United States Constitution?

II.

Does the Respondent's failure to announce the applicable standards for review of an application for a comprehensive land use plan amendment and explain the said standards at a point early in the proceedings, to include the local citizen's group for input in the planning process and to permit the Planning Commission to review the said application, violate Petitioners' rights as reserved to the people by the Ninth and Tenth Amendments to the United States Constitution?

III.

Do land use procedures that announce standards in quasi-judicial proceedings for a zone change and that do not announce statutorily mandated standards in quasi-judicial proceedings for a comprehensive land use plan amendment create different procedural classifications in land use cases which infringe upon Petitioners' First Amendment right to petition for redress of grievances and other fundamental rights which are not balanced by a compelling state interest or alternatively which clasification is not supported by any rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

THE PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption of the case in this Court, the Oregon Department of Land Conservation and Development intervened in the proceedings before the Land Use Board of Appeals. The Department did not participate further in the proceedings of this case before the Oregon Court of Appeals or the Oregon Supreme Court.

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OPINIONS OF THE COURTS BELOW

This matter was reviewed by the Oregon Land Use Board of Appeals which Board affirmed the decision of the Respondent with a Final Opinion and Order issued July 19, 1984. A copy of said Final Opinion and Order is appended hereto in full. (A-2 to A-17) There is no official report of said opinion. The Court of Appeals affirmed without opinion as noted in the Oregon advance sheets at 70 Or. App. 355 (October 17, 1984) and the Supreme Court denied review without opinion as noted in the Oregon advance sheets at 298 Or. 597 (January 29, 1985). There are no opinions of said courts to append hereto. However a copy of the journal entry is included in the Appendix at A-1

GROUNDS TO INVOKE JURISDICTION OF THIS COURT

(i) The Judgement of the Oregon Court of Appeals was filed on October 17, 1984.

(ii) The Oregon Supreme Court denied Petitioners' Petition for Review on January 29, 1985.

(iii) Petitioners believe that 28 U.S.C. Section 1257 (3) confers on this Court jurisdiction to review the judgement in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS WHICH THE CASE INVOLVES

Constitutional Provisions

First Amendment, United States Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

Ninth Amendment, United States Constitution. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment, United States Constitution. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, United States Constitution. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

STATE STATUTES

ORS 197.175(2) Pursuant to ORS 197.005 to 197.430 and 197.610 to 197.850, each city and county in this State shall: (a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission.

ORS 197.250 Except as otherwise provided in ORS 197.245, all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use compliance with the goals within one year after the date those goals are approved by the commission.

ORS 197.835(4) Notwithstanding the provisions of subsections 2 and 3 of this section, the board shall reverse or remand a decision to adopt an amendment to an acknowledged comprehensive plan or land use regulation if the amendment or new regulation does not comply with the goals. The board shall find an amendment or new land use regulation in compliance with the goals, if:

(a) The Board determines that the amendment to an acknowledged land use regulation or the new land use regulation is consistent with specific related land use policies contained in the acknowledged comprehensive plan; or

(b) The amendment to an acknowledged comprehensive plan or land use regulation or the new land use regulation, on the whole, comply with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature.

L.C.D.C. STATEWIDE GOALS AND GUIDELINES

Oregon Land Conservation and Development Commission Goals No. 1 (Citizen Involvement) and 2 (Land Use Planning). These goals are too lengthy to be reproduced here. Therefore, they are reproduced in the Appendix at A-26 to A-40

CITY OF PORTLAND COMPREHENSIVE PLAN

Citizen Involvement

Goal 9. Improve the method for citizen involvement in the on-going land use decision-making process and provide opportunities for citizen participation in the implementation, review and amendment of the adopted Comprehensive Plan.

Policy 9.1 Citizen Involvement Coordination. Encourage citizen involvement in land use planning projects by actively coordinating the planning process with relevant community organizations, through the reasonable availability of planning reports to city residents and businesses, and notice of official public hearings to neighborhood associations, business groups, affected individuals and the general public.

Policy 9.3 Comprehensive Plan Amendment. Allow for the review and amendment of the adopted Comprehensive Plan which insures citizen involvement opportunities for the city's residents, businesses and organizations.

Plan Review and Administration

Goal 10. Portland's Comprehensive Plan will undergo periodic review to assure that it remains an up-to-date and workable framework for land use development. The plan will be implemented in accordance with State Law and the Goals, Policies and Comprehensive Plan Map contained in the adopted Comprehensive Plan.

Policy 10.3 Interim Plan Review and Amendment. Proposed amendments to the Goals, Policies and Map of the Comprehensive Plan and implementing ordinances will be reviewed by the Planning Commission prior to action by the City Council, consistent with citizen involvement procedures and State law....

Policy 10.4 Comprehensive Plan Map Amendments. Requests for modification of the Comprehensive Plan Map designations will proceed under the regulations, notifica-

tion requirements and hearing procedures used for zone change requests. The burden of proof for such change is placed upon the petitioner seeking such an action. The applicant must show that the requested change is (1) consistent and supportive of the appropriate Comprehensive Plan Goals and Policies, (2) compatible with the land use pattern established by the Comprehensive Plan Map, (3) in the public interest to grant the petition; the greater the departure from the Comprehensive Plan Map designation, the greater the burden of the applicant, and (4) that the interest is best served by locations. Rezoning may be considered concurrently with the request for modification of the Comprehensive Plan Map designation.

STATEMENT OF THE CASE

This Petition of Writ of Certiorari seeks review of the Respondent's decision to grant an application for an amendment to its Comprehensive Land Use Plan altering the planning designation of the applicant's property from an R-5 (residential) to a C-3 (commercial) designation. Pursuant to the procedures of the Respondent, the applicant, Strohecker's Inc., sought both a plan amendment and a zone change for property located at 2855 S.W. Patton Road including two adjacent lots to the northeast (Record at 959).

Petitioners, Steve Gann and Christine Gann, are husband and wife and reside at 2814 S.W. Periander Street, Portland, Oregon. Their property abuts that of the applicant and they live within sight and sound of subject property. They had a right to and did receive written notice of the proposed action (Record at 445). Steve Gann filed written opposition to the proposed action (Record at 146). Christine Gann testified at the public hearings (Record at 33-34, 93-95 and 508), and submitted testimony in

writing (Record at 622-623). She also appealed the Hearing Officer's decision (Record at 463-466, 470). They have substantial property interests that they seek to protect.

The present use of the subjects property is a grocery store known as Strohecker's, Inc. and a family market has occupied one parcel of the property for 82 years (Record at 510). It was purchased by Strohecker's, Inc. after the structure was burned in 1982 and demolished by them. The site is one acre in size and is located within a developed neighborhood characterized by well-maintained older single family homes. There is a five-acre city park (Portland Heights Park) which borders the site on the west. Strohecker's Inc. is presently a non-conforming use (Record at 509). The planning staff felt the proposed expansion was excessive (Record at 973). The proposed C-3 zoning designation was not an appropriate or perfect fit for the use (Record at 513 and 963).

The applicant sought a Plan Change from a residential designation to a commercial designation to allow for a 1.7 million dollar expansion of the existing structure. They also sought a zone change from an R-5 (residential) zone to a C3 (Local Commercial Use) was granted (Record at 5 and 524). The zone change from R5 to C3 was granted subject to many conditions including one that the use of the site shall be restricted to a grocery store (Record at 5-7 and 525-527).

The Respondent granted the Application for a plan amendment and zone change by Ordinance No. 155609 on February 16, 1984. For the text of the ordinance see appendix herein at pages A-18 to A-22. In accordance with Respondent's procedure the matter was first heard by a Hearings officer who submitted his Report and Recommendation on November 18,

1983. The staff report submitted to the Hearings Officer concluded that since the Land Conservation and Development Commission acknowledged the comprehensive plan, it therefore complied with the Statewide Goals and no further consideration was accorded those statewide goals. (Record at 964) The Hearings Officer's report specifically stated:

> **C. Comprehensive Plan Amendment Consideration.**
>
> The Standards for judging an amendment to the Comprehensive Plan Map are found in Plan Policy 10-4. The amendment from "High Density Single-Family" to "Local Commercial" can be approved if the following requirements are met:
>
> 1. The change is consistent with and supportive of the appropriate Plan goals and policies.
> 2. This change is compatible with the land use pattern established by the Plan Map;
> 3. It is in the public interest to grant the Map change; and
> 4. The public interest is best served by granting the change at this time and at this location.
>
> The Hearings Officer finds that these requirements are Met and that the Comprehensive Plan Map designation should be amended to "High Density Single-Family" to "Local Commercial" for the following reasons: (Record at 514).

The Report of the Hearings Officer is submitted herewith under separate cover as it is too voluminous for reproduction in the appendix herein.

Petitioners and the Southwest Hills Residential League appealed to the Portland City Council (Record at 463-502). The Respondent denied their appeal and adopted Ordinance No. 155609 on February 16, 1984. Throughout the entire record of 1011 pages as originally submitted to the Oregon Land Use

Board of Appeals there is no other reference that the Land Conservation and Development Commission's (hereinafter L. C.D.C.) Statewide Goals or Guidelines and there are no findings concerning those goals in Ordinance No. 155609.

Petitioners appealed Ordinance No. 155609 to the Land Use Board of Appeals (hereinafter L.U.B.A.) on March 8, 1984. After the Respondent's Record was submitted to L.U.B.A, the Respondent sought to amend Ordinance No. 155609 and did amend said Ordinance with the adoption of Ordinance No. 155850 on April 19, 1984. For the full text of Ordinance No. 155850 see appendix herein at pages A-23 to A-25. Petitioners filed a written Notice and Request for the opportunity to be heard for the purpose of reopening the proceedings to develop facts before the planning commission in view of the proposed findings concerning L.C.D.C. Statewide Goals and Guidelines. The aforesaid Notice stated as follows:

> "My name is John H. Clough and I am counsel for Steve Gann and Christine Gann in their appeal of the above captioned matter to the Land Use Board of Appeals. Since the City is considering amending Ordinance No. 155609, which Ordinance is already on appeal to L.U.B.A., my clients contend that the City has no jurisdiction to amend or alter the said Ordinance in this case without reopening the entire record for the participation of my clients.
>
> "Since the City is proposing action that would affect a pending appeal and has not to date indicated that the Petitioners in that appeal may even have the opportunity to be heard in this matter, this Notice is hereby filed before the Land Use Board of Appeals and served upon the City Council to preserve important due process rights of the Petitioners. Since this matter also constitutes a summary of Petitioners' position in this matter, it is also requested that this notice be made part of the record of any proposed action under the City's PC File No. 7334-PA. It is further

requested that the counsel for Mr. and Mrs. Gann be permitted to be heard before the City Council in this matter to present orally on the record their position in this matter.

"It is clear from the record in this case that the Statewide Goals and Guidelines were not even mentioned let alone considered as the framework for issues to be resolved in the planning context. Any application for a plan change must be viewed in the context of its *planning* implications not merely treated like a traditional zone change application.

"It is also clear that the 'spot plan' of a commercial area within an established residential area automatically raises serious *planning* issues that should be dealt with by the City. From a planning context the nature of an existing use is irrelevant to the initial inquiry. In this case the use existed at the time of adoption of the Plan and there were planning reasons for not designating the area in question commercial in the first place. It can be presumed that the City properly did its planning job in the initial adoptions of the Plan. Thus, those reasons have not been addressed to date in this case and they should be.

"Therefore, the questions raised by the Ganns are further complicated by the presence of the adopted and acknowledged Comprehensive Plan. The city has already undergone a substantial planning effort resulting in the adoption of a Comprehensive Plan subsequently acknowledged by the Land Conservation and Development Commission. In the consideration of an application for plan change to this acknowledged Plan, the Plan's intergrated elements, inventories of existing uses, stated and implied policies and extensive map must be re-evaluated in the same planning context as was the original adoption of the Plan. Now, however, this re-evaluation should be done with the idea that the *planning* process is more concentrated or focuses upon the implications of the specific proposed plan change. This re-evaluation *must* be done within the framework of the Statewide Goals and Guidelines under ORS 197.834(4).

"Such a review as is statutorily required was not undertaken in this case. To adopt the position that because the Goals of the Portland Plan were adopted pursuant to the Statewide Goals and are substantially similar to those Goals, in order to justify findings in Ordinance No. 155609 that the proposed plan change complies, by implication with the Statewide Goals is suspecious and begs the question raised by the Ganns. Any such findings cannot salvage this present Ordinance. The City's problem in this regard is even greater when it is considered that no mention of the Statewide Goals were made throughout the record. My clients contend that the only way the City can correct this obvious problem is to fully re-open the matter and refer it to the Planning Commission to do the job that should have been done in the first place: exercise the City's *planning* authority.

"This action, required in the first instance, was never done, and it would be inappropriate now to raise and argue the merits of this matter where there is not adequate notice and opportunity to be heard before the proper forum (stage) in the process: the planning commission. The merits will require the concurrent institution of the related legislative aspects (through an expanded hearings process) inherent in the planning process. My clients contend that no valid action may be taken by the City short of this procedure and further request that this notice be made a part of the record in any proposed further action by the City in this matter."

(Record at 1019-1022)

The Respondent did not reopen the proceedings and proceeded to vote on and adopt Ordinance N. 155850 (Record at 1015-1018). Both Ordinances were L.U.B.A. and the Board's determination was based upon both Ordinances. The Petitioners raised the following constitutional issues as assignments of error before L.U.B.A.:

ASSIGNMENT OF ERROR NO. 4

The City Council's action in amending the findings of this case in accordance with standards not heretofore raised in the record without having a public hearing and notice and opportunity to be heard, violated Petitioners' right to due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution....

ASSIGNMENT OF ERROR NO. 5.

The City Council in failing to provide the same procedures to Petitioner in adopting Land Use Ordinance No. 155850 as provided in all other situations adopting land use ordinances violated the Petitioners' right to equal protection of the law as guaranteed under the Fourteenth Amendment of the United States Constitution....

All twelve of the assignments of error raised before L.U.B.A. are set forth in full in the opinion of the Board. See Appendix herein at pages A-2 to A-17.

L.U.B.A. affirmed the decision of the City of Portland by entering its Final Opinion and Order herein on July 19, 1984. The Opinion denied Petitioners' constitutional claims along with all of their other assignments of error. The Petitioners appealed to the Oregon Court of Appeals for their first opportunity for judicial review of this matter. In their appeal they raised the following assignments of error:

ASSIGNMENT OF ERROR NO. 3

LUBA erred in holding that the action of the City of Portland, in adopting Ordinances Nos. 155609 and 155850 did not violate Petitoners' rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution...

ASSIGNMENT OF ERROR NO. 4

LUBA erred holding that the action of the City of Portland in adopting Ordinances Nos. 155609 and 155850 did not violate Petitioners' rights to equal protection of the laws as guaranteed by the Fourteenth Admendment to the United States Constitution....

The Oregon Court of Appeals affirmed the decision of LUBA without opinion on October 17, 1984. The Petitoners timely filed a Petition for Review they raised and discussed the following points and authorities:

> 4. Oregon statutes (ORS197.175(2)(a) and 197.835(4)9 combined with LCDC Statewide Goals Nos. 1 and 2 taken in conjunction with the local Comprehensive Plan, have identified the process that is due in land use proceedings and a violation of those processes or procedures also violates Petitioners' constitutional right to due process of law guaranted by the Fourteenth Amendment to the United States Constitution...
>
> 5. In a zone change the standards are announced in the plan and in the written findings of facts. In a plan change proceeding those standards were not so announced. This situation creates a difference in classification between zone changes and plan amendments. There is no rational basis for this distinction and, it violates petitioners' reight to equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Costitution....

The Oregon Court of Appeals denied rehearing without opinion and subsequently the Oregon Supreme Court denied review without opinion on January 29, 1985. The Constitutional issues raised herein were preserved directly or by necessary implication throughout the course of these proceedings. The factual issues giving rise to the constitutional questions were specifically raised before L.U.B.A., the Oregon Court of Appeals and the Oregon Supreme Court.

ARGUMENT

The issues raised in this petition are substantial and important and related to issues presently pending before this Court. Petitioners contend that this Petition presents the opportunity to provide some solutions, thereby easing considerations raised in cases that are coming to this Court with increasingly regularity. The number and frequency of those cases will not diminish until the issues raised herein are addressed by the Court.

The petition raises due process and equal protection considerations involved in the procedure for making land use determinations before local governing bodies. The basic procedure for making land use determinations is similar in every state. This petition comes from the State of Oregon where a conscious effort has been made since 1969 to develop both substantive and procedural standards for making land use determinations. Oregon has created a statewide method of coordination of land use matters and established a state commission, the Land Conservation and Development Commission, to deal with land use issues from a statewide level. Generally see Ore. Rev. Stat., Chapter 197. This Commission has adopted Statewide Goals and Guidelines that are required to be applied by local governing bodies in the development of their comprehensive plans and in making any amendment to those plans. Or. Rev. Stat., Sections 197.175(2)(a) and 197.250. Two of these statewide goals involve procedure for making land use determinations, to wit: Goal No. 1 (Citizen Involvement) and Goal No. 2 (Land Use Planning). For text of these goals see the Appendix herein.

The statutory and regulatory law of the State of Oregon provide an excellent background for the resolution of due process considerations involved in the land use determinations. E.g., *Mathews v. Eldridge,* 424 U.S. 319, 334-36 (1976). Even the citizen involvement issues may be viewed as an alternative expression to the analgous duty of the administrative law judges to inquire and develop the facts. See *Heckler v. Campbell,* 461 U.S. 458, 470-72 (1983). (Brennan, J., concurring). *Cf. City of Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668 (1976). Petitioners contend that the Statewide Goals and the Respondents Comprehensive Plan provide the framework for the resolution of the due process considerations. They determine the hearing that is appropriate to the nature of the case. *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 313 (1950). Equally as well the Respondent's Comprehensive Plan gives rise to the equal protection challenges raised by the Petitioners. E.g., *Lindsey v. Normet,* 406 U.S. 56, 74-79 (1972).

Most frequently the cases that involve land use matters have been raised in the context of the issue of whether a "taking" of property has occurred by the adoption of land use restrictions which action, so it is alleged, requires that compensation be paid to the land owner or holder of the property right. The parade of cases beginning with *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922) need not be repeated here. See e.g., *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621 (1981); *Agins v. City of Tiburon,* 447 U.S. 255 (1980). This seems to be the natural outgrowth of *Village of Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926) and the inevitable result of affirmative land use planning activity. The issues are before the Court today in the case of *Williamson County Regional Planning Commission*

v. Hamilton Bank of Johnson City, 729 F 2d 402 (6th Cir., 1984) cert. granted October 1, 1984, U.S. Supreme Court Docket No. 84-4, argued February 19, 1985, decision pending. The circuits appear to be split on the issues raised in the *Williamson* case. E.g., *MacLeod v. County of Santa Clara,* 749 F2d 541, 549, n. 8 (9th Cir., 1984). This petition presents an added dimension to the problems involved in the "taking" cases. The resolution of the *Williamson* case may affect this case, but will not be dispositive of it.

The court has stated previously that property rights are defined by state law. E.g., *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). The process of the definition of property rights was reaffirmed in cases such as *Texaco, Inc. v Short,* 454 U.S. 516, 525 (1982) and *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.,* 429 U.S. 363 (1977). Land use planning is part of the process by which the state and local governments define the quality of the estate held by the property owners as they interrelate with their neighbors and the community at large. Generally see, Clough, PROPERTY: ILLUSIONS OF OWNERSHIP (1985). They create a property interest in adjacent or affected landowners that is affected by any land use decision. See Clough, PROPERTY:, *supra* at 84, n. 2-4 and accompanying text. More often those who are considered to have that property interest are characterized as having "standing" to object to proposed land use rulings. See Clough, PROPERTY:, *supra* at 106, n. 56 and 110, n. 65 and accompanying text. Unfortunately, in the "taking" cases such as the *Williamson* case presently before this Court, the litigants deal with a characterization of that interest as part of a "bundle of sticks". It is, in reality, an interest in a fluid, on-going

process, which process is constantly in motion. The "property right" referred to is a vested interest in that land use process. When viewed from the perspective of this case, Petitioners' interest in the process involves a fundamental *liberty* that we, as members of a rational society, surrender to the government as part of our social compact. *Calder v. Bull,* 3 Dall. (3 U.S.) 386, 388 (1798). Whether it is characterized as a loss of a precisely or loosely defined property interest, or a violation of the public trust or a breach of social contract or compact, it is a deprivation of *both property and liberty* that is protected by the due process clause of the Constitution. See Clough, PROPERTY:, *supra* at 61-62 and 131. The social compact theories track into the due process clause of the Constitution. Consider the following line of due process cases presenting a direct flow of precedent from *Calder v. Bull, supra: McVeigh v. U.S.,* 11 Wall. (78 U.S.) 259, 267 (1871); *Windsor v. McVeigh,* 93 U.S. 274, 277 (1876); *Boddie v. Connecticut,* 401 U.S. 371, 377-78 (1971).

Oregon has adopted the position that applications for changes in land use designations are quasi-judicial in nature and has prescribed certain procedural requirements as a matter of case law. E.g., *Fasano v. Bd. of County Cmm'rs,* 264 Or. 574, 507 P. 2d 23 (1973). Thus, the "legislative" aspects of land use decisions made pursuant to quasi-judicial hearings are subject to due process considerations notwithstanding cases such as *Texaco, Inc. v. Short, supra* and *City of Eastlake v. Forest City Enterprises, Inc., supra.* Both the determination of substantive standards and procedure was done by case law prior to the adoption of the Statewide Goals and Guidelines in 1974 and the lengthy process of acknowledgement of local comprehensive

plans by the Land Conservation and Development Commission. Now Oregon courts look to the Statewide Goals or the local comprehensive plan or both for the standards to apply in land use matters. E.g., *Neuberger v. City of Portland,* 288 Or. 155, 167-70, 603 P. 2d 771 (1979). See Clough, PROPERTY:, *supra* at 106-07, n. 57. Simply stated, if the local governing authorities fulfill their function through the use of an established process, it is easier for reviewing courts to determine if the substantive standards have been complied with by the local governing body. See Clough, PROPERTY:, *supra* at 84-86. Such procedures apply notwithstanding the unique blend of legislative and judicial functions in the context of local government. See discussion in *Strawberry Hill 4 Wheelers v. Benton County,* 287 Or. 591, 594-602, 601 P.2d 769, 771-75 (1979). See Clough, PROPERTY:, *supra* at 104-112.

Petitoners contend that adherence to an agreed procedure is a matter of public trust and where that procedure is defined, it gives rise to a due process right in the Petitioners, thus requiring that said procedure be followed. E.g., *Mathews v. Eldridge, supra.* Furthermore, if there is a means of assurance that the agreed procedures have been followed, the cases involving the "taking" issue may be more comfortably resolved by a reviewing court. An exhaustion of administrative remedies would also provide the context for review of the balancing of factors involved in a claimed taking of property through the exercise of the government's planning authority.

Although Oregon is in the forefront of comprehensive land use planning, other states are finding their own expression of the basic process. See states listed in Clough, PROPERTY:, *supra* at 35, n. 6. Many states have adopted the characterization

of land use proceedings as quasi-judicial. Some, like Idaho, follow Oregon's *Fasano* decision and it is safe to say that the potential for issues such as the ones involved in this petition will only continue to grow. E.g., *Cooper v. Bd. of County Comm'rs of Ada County,* 101 Idaho 407, 409-10, 614 P.2d 947 (1980) Therefore, this petition provides clear issues and an excellent vehicle for discussion of the process.

Petitioners contend that the Respondent failed to follow the mandated procedures in the following particulars:

1. The Respondent identified the wrong standards at the initial hearing level and failed to even mention the correct, statutorily mandated procedures, to wit: the Statewide Goals and Guidelines, until after the case was on appeal. ORS 197.175(2)(a) and 197.835(4). This was tantamount to providing no standards at all.

2. The Respondent failed to provide technical assistance to the Petitioners in announcing and explaining the proper standards as required by Statewide Goals and Guidelines Nos. 1 & 2. Respondent had an affirmative duty to announce and explain the applicable standards at the beginning of the proceedings L.C.D.C. Goal No. 1, Guideline No. 4 (B).

3. The Respondent failed to include the neighborhood association into the planning process as required by Statewide Goals 1 & 2 and the Portland Comprehensive Plan Goal 9, Policies 9.1 and 9.3

4. The Respondent never referred this matter to the planning commission as required by the clear language of its own comprehensive plan policy 10.3. The language of the Plan is clear on its face in this regard. See *City of Hillsboro v. Housing Development Corp. of Washington County,* 61 Or. App. 484, 488-89, 657 P.2d 726 (1983).

5. When the Respondent moved to amend the Ordinance granting the application for change in the comprehensive plan to include the said correct standards, which standards had not been raised previously in the proceedings herein, the Petitioners request to reopen the proceedings and refer the matter to the planning commission was denied. This effectively denied the Petitioners an opportunity for development of the facts in light of the applicable standards for the proceeding. Hence, there was no framework for the land use decision as required by Statewide Goal No. 2.

6. The deleterious effect of the Respondent's procedural errors is enhanced by the fact that this case presented a classic situation of *spot planning* (analogous to *spot zoning*) which is an inherently suspect land use decision. See Clough, PROPERTY:, *supra* at 106-07, n. 57 and accompanying text.

7. Respondent asserted below that Portland Comprehensive Plan Policy 10.4 both identified the standards and excused its refusal to submit this matter to the Planning Commission notwithstanding Plan Policy 10.3. This creates a situation where zone change hearings have their standards announced whereas applications for plan amendments do not. This created a difference in procedural treatment for the two types of quasi-judicial cases when there is no rational basis to do so. *Lindsey v. Normet, supra* at 74-79.

8. The nature and character of the land use process is, by necessary implication, one that is protected by the Ninth and Tenth Amendments to the Constitution. *Cf. City of Eastlake v. Forest City Enterprises, Inc., supra,* and compare with *United Public Workers v. Mitchell,* 330 U.S. 75, 94-96 (1947). See Clough, PROPERTY:, *supra* at 23-24 and 74.

Petitioners contend that the Respondent's failure to follow the procedures in the aforementioned particulars taken individually or collectively denied Petitioners their Constitutional rights. All issues raised herein were raised before the state court system factually, directly or by necessary implication. The issue characterization shifted as the case moved through the system, however the essential constitutional questions were maintained throughout. The state judicial system had the opportunity to review this matter, but declined to write an opinion in this case. Thus, the only written opinion available is the one expressed by the administrative Board, L.U.B.A.

In short, the Petitioners contend that the Respondent omitted required standards, by-passed the required forum of the planning commisssion, denied the citizen involvement in its required context in the process, and refused to remedy the problem when requested to do so. The issues in this petition rest on the responsibility and constitutional accountability of the Respondent in fulfilling its procedural obligations involved in sensibly *planning* the area. Any effort to exercise *planning* authority and amending a comprehensive plan in Oregon is governed by the Statewide Goals, notably Goals 1 & 2. These goals require citizen involvement to be integrated into the process and facts to be responsibly developed by the Respondent to provide meaningful information and data for the feedback mechanism to work properly. The procedural error is so fundamental and basic that it stifled dialogue and frustrated the whole process. Since the process of planning develops the policy and standards, it, by definition, must precede the implementation process: zoning.

It seems impossible to expose a more basic failure of the process than presented in this petition. It rises to the level of deprivation of the Petitioner's constitutional rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution. Because of the inherent nature of the land use planning process, it necessarily involves issues concerning the First Amendment guarantee of petition for redress of grievances and the rights reserved to the people by the Ninth and Tenth Amendments to the Constitution. However the issues are characterized, the facts give rise to a fundamental issue here. We are a government of laws. Therefore, we mutually agree as to what those rules of law, procedure and policy should be. That is our social compact. When there is so flagrant a deviation from those accepted and mandated rules, it breeches the public trust, violates our Constitutional safeguards and cannot be permitted to stand.

The Petitioners request that this Court grant their Petition for a Writ of Certiorari and set this matter for plenary consideration by the Court to adequately develop the issues raised herein.

Respectfully submitted,

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Portland, Oregon 97209
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Attorney for Petitioners

IN THE COURT OF APPEALS
OF THE
STATE OF OREGON

STEVE GANN and CHRISTINE GANN,

Petitioners,

v. CA A32850

CITY OF PORTLAND,

Respondent.

Agency Case No. 84-015
Judicial Review from Land Use Board of Appeals
Date argued: September 17, 1984
Before: Buttler, Presiding Judge, and Warren and Rossman, Judges.
John H. Clough, Portland
Attorney for Petitioners
Kathryn Beaumont Imperati, Portland
Attorney for Respondent
Date affirmed without opinion and date filed: October 17, 1984
The prevailing party is respondent
Costs are awarded to the prevailing party
The parties responsible for paying costs are petitioners
The following entries will be made as appropriate at the time that the appellate court decision is enforceable. Attorneys see Rules 11.03, 11.05 and 11.10. It is therefore ordered that the prevailing party recovers from Petitioner costs and disbursements on appeal, taxed at $227.48.
The Supreme Court denied petition for review on January 29, 1985.
Date appellate court decision is enforceable: March 7, 1985.

BEFORE THE LAND USE BOARD OF APPEALS OF THE STATE OF OREGON

STEVE GANN, CHRISTINE GANN	)	
Petitioners	)	LUBA No. 84-015
vs.	)	FINAL OPINION AND ORDER
CITY OF PORTLAND,	)	
Respondent	)	

Appeal from the City of Portland

John H. Clough, Portland, filed the Petition for Review and argued the cause on behalf of the Petitioners. With him on the brief were Ransom and Clough.

Kathryn Beaumont Imperati, Portland, filed the response brief and argued the cause on behalf of the Respondent City.

Appearance on a brief by the Department of Land Conservation and Development pursuant to ORS 197.830 (6).

BAGG, Chief Referee; DuBay, Referee; KRESSEL, Referee; participated in this decision.

AFFIRMED 07/19/84

You are entitled to a judicial review of this Order.

Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bagg

NATURE OF THE DECISION

Petitioners appeal a comprehensive plan and zone change. The changes were approved by the Portland City Council and permit the remodeling and expansion of a food market in Southwest Portland.

FACTS

The market, Strohecker's, Inc., is located on the north side of Southwest Patton Road, between Old Orchard Road and Southwest Homar Avenue and is bounded on the north, east and south by a residential neighborhood and on the west by a city park (Portland Heights Park). The store has been operated in this location since 1902. It became a non-conforming use in 1924. It has expanded twice, the first time in the 1920s and the second time in the 1950s.

In September, 1983, the applicant, Strohecker's, Inc., filed an application to amend to the City of Portland Comprehensive Plan Map designation from High Density Single Family Residential to Local Commercial. Along with the plan change request was a request to change the zoning from R-5, a Single-Family Residential Zone, to C-3, the 'Local Commercial' Zone. These changes would cover the site of the store and two adjacent lots to the north. The changes would enable the store to remodel and expand.

On November 8, 1983, the city hearings officer held a hearing on the matter and on November 16, 1983, he recommended approval of the changes subject to several conditions. This recommendation was appealed to the city council, and on January 25, 1984, the city council heard the appeal and voted to uphold the hearings officer's recommendation and grant the

changes. Ordinance No. 155609 was adopted on February 16, 1984, formalizing the decision.

Petitioners filed a notice of intent to appeal with this Board on March 8, 1984. However, on April 19, 1984, the city council adopted Ordinance No. 155850, amending the previous approval on February 16. This later ordinance was enacted to identify those findings in Ordinance No. 155609 addressing the substantive requirements of the statewide goals. The earlier ordinance, No. 155609, included no findings identifying and stating compliance with applicable statewide land use planning goals.[1] Petitioners were notified in advance of the proceedings to adopt the second ordinance and were present at the hearing on April 19, 1984. At that time, petitioners presented both oral and written testimony opposing this second ordinance.

ASSIGNMENTS OF ERROR 1-3

"The City Council erred in failing to make any findings that the proposed Plan Amendment to an acknowledged Comprehensive Plan complied with the Statewide Goals and Guidelines, and violated ORS 197.835(4) and Statewide Goals Nos. 1 & 2 and Portland Goal No. 1."

"The City Council erred in attempting to resume jurisdiction over Ordinance No. 155609 by amending it with the adoption of Ordinance No. 155850 on April 19, 1984 without opening the entire matter to public hearing and testimony concerning issues relating to the Statewide Goals and Guidelines."

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[1]The city's comprehensive plan and implementing ordinances have been acknowledged as being in compliance with statewide land use planning goals. Because the city was amending its comprehensive plan, a showing of compliance with statewide planning goals was necessary. *See* ORS 197.175; 197.835.

"The City Council's action in amending the findings in this case in accordance with standards not heretofore raised in the record without having a public hearing violated Statewide Goals and Guidelines Nos. 1 and 2."

In the first three assignments of error, petitioners claim the city failed to make findings showing compliance with statewide planning goals and certain goals of the City of Portland Comprehensive Plan. Further, petitioners argue adoption of Ordinance No. 155850, supplying missing findings on statewide planning goals is improper and not effective. It is petitioners' position that adoption of the second ordinance would only be appropriate where the matter of compliance with statewide planning goals was open to a full hearing following the same notice formalities as required for any other comprehensive plan and zone change amendment procedure. Because the city did not give such notice and conduct such a hearing, Ordinance No. 155850 is in violation of statewide planning goals 1 and 2 and is not effective to supply the missing findings to the original approval, according to petitioners.[2]

We are required to reverse or remand a post acknowledgement plan amendment absent (1) findings demonstrating conformance with specific plan policies controlling the plan amendment. ORS 197.835 (2). The city has not cited us to any policies

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[2]It is not clear to us what specific portions of Goals 1 and 2 are claimed to be violated. Presumably, petitioners are arguing that Goal 1 requirement that local governments insure an opportunity 'for citizens to be involved in all phases of the planning process' has been violated by the city's failure to give notice and a full hearing on the question of goal compliance. Petitioners' complaint about compliance with Goal 2 may rest on a similar requirement as follows:

"Opportunity shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances."

that specifically control this decision; therefore, findings showing compliance with the goals were indeed necessary.

In this case, however, the city and the petitioners agreed in a stipulation made June 15, 1984, that the Respondent City could supplement the record on appeal to LUBA by inclusion of Ordinance No. 155850.[3] We believe the parties have invited us to consider the city's decision as embodied in the two enactments, Ordinance No. 155609 (the original approval) and Ordinance No. 155850 (the amendatory ordinance).[4] We will reveiw the two ordinances as one decision.

We do not find the petitioners' complaints about compliance with statewide planning Goals 1 and 2 requires us to remand this case. Goal 1 and Goal 2 require that the planning process be open and involve citizens. However, we find nothing in this record to suggest that citizens were not invited to participate in this process or were precluded from participation. There is no allegation and no evidence in the record that compliance with statewide planning goals was excluded from the council's consideration during the course of the proceedings leading to the first ordinance, Ordinance No. 155609. Had petitioners (or

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[3]The agreement was made ".....to avoid the requirement and burden of filing two appeals."

[4]Had petitioners chosen not to enter into this stipulation, this case would have been remanded for failure to adopt findings showing compliance with statewide planning goals. Also, petitioners could have filed a separate appeal of Ordinance No. 155850. Apparently for the sake of the economy and in order to have a full hearing of the merits of the case, the parties agreed that we might review both ordinances. In making this review, we do not wish to suggest that land use decision makers may, absent some sort of stipulation as in this case, make a decision and then only when an appeal is filed decide to reopen the matter for adoption of findings to protect the decision. The finding of facts supporting a decision does not follow the decision, but must precede it. *See Heilman v. City of Roseburg,* 39 Or App 71, 591 p2d 390 (1979).

anyone else) desired to make comment on compliance with statewide planning goals, there is nothing in this record to suggest that they could not have done so during the course of the first hearing. Also, as we noted, *supra,* at page 3, the amendatory ordinance, for the most part, simply lists those findings made in conjunction with the passage of Ordinance No. 155609 which show compliance with particular statewide planning goals. There was no separate goal analysis undertaken in Ordinance No. 155850; and, indeed, it appears that the second ordinance simply serves as a guidepost showing the reader where in the original set of findings to find evidence of the city's compliance with statewide land use planning goals.

Further, these petitioners were afforded an opportunity to appear and comment on the question of compliance with statewide planning goals and the question of the adoption of Ordinance No. 155850.[5]

Petitioners make an additional argument worth noting. Petitioners allege the city had a duty to announce, at the beginning of its proceedings, that the statewide planning goals were a part of the approval criteria applicable to the plan amendment and zone change decision.[6] The record does not show the city to have announced what criteria applied to the decision. However, we are unaware of a requirement that the city recite the state law and the published portions of its ordinances that apply to the

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[5]We wish to caution, however, that while statewide planning Goals 1 and 2 may not preclude the city's action in this case, our holding is based upon all of the facts in this case including the agreement of the parties for us to review both ordinances. *See* Footnote 3, *supra,* and ORS 227.173 and ORS 215.416.

[6]The only exception to showing compliance with statewide planning goals is where there are 'specific' plan policies controlling the decision. That exception is found in ORS 197.835(6) and is not argued to be applicable in this case.

matter under review. It is sufficient that the governing standards are identified in the county zoning code or other official regulations. *See Orr v. City of Eugene,* 6 Or LUBA 206, 212 (1982).

Therefore, petitioners' complaint that the city erred in failing to make findings showing compliance with the statewide planning goals is denied. Petitioners claim the procedure followed by the city violated statewide planning Goals 1 and 2 is denied.[7] Petitioners' complaint the city erred in attempting to adopt an amendatory ordinance without opening the entire matter to public hearing is, similarly, denied.

ASSIGNMENTS OF ERROR 4 and 5

"The City Council's action in amending the findings of this case in accordance with standards not heretofore raised in the record without having a public hearing and notice and opportunity to be heard, violated Petitioners' right to due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Oregon Constitution."

"The City Council in failing to provide the same procedures to Petitioner in adopting land use Ordinance No. 155890 as provided in all other situations adopting land use ordinances violated the Petitioners' right to equal protection of the law as guaranteed under the Fourteenth Amend-

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[7]Petitioners make a claim that Goal 1 of the City of Portland Comprehensive Plan was violated. Petitioners fail to explain the nature of this violation, and we will not speculate on how the goal is violated. The goal provides:

"The Comprehensive Plan shall be coordinated with federal and state law and support regional goals, objectives and plans adopted by the Columbia Region Association of Governments and its successor, The Metropolitan Service District (Metro), to promote a regional planning frame work."

ment to the United States Constitution and Article I, Section 20, of the Oregon Constitution."

In these two assignments of error, petitioners claim violation of rights guaranteed by both the Oregon and the Federal Constitutions. The substance of the claim is the alleged inadequacy of notice and denial of an opportunity to be heard "in proper fashion".

Petitioners claim they were treated differently than others seeking comprehensive plan and zone changes and therefore were denied equal protection of the laws.

We do not find a violation as alleged. As noted, the petitioners in this case were provided notice and a full opportunity to appear and be heard on the matter of statewide goal compliance. Petitioners exercised the opportunity. We do not believe petitioners' constitutional rights were violated by a procedure in which they were allowed full participation. *Morrison v. City of Cannon Beach,* 6 Or LUBA 74 (1982).

ASSIGNMENTS OF ERROR 6 and 7

"The City Council erred in making findings that the proposed plan amendment complied with the Statewide Goals and Guidelines as there was no evidence in the record to support such findings."

"The City Council erred in finding that 'Since the City's acknowledged comprehensive plan includes Guidelines and policies substantially similar to all relevent statewide goals and guidelines, compliance with the City's plan also indicates compliance with the statewide goals and guidelines."

In these assignments of error, petitioners claim there is no substantial evidence to support the city's findings on goal compliance. In their argument, however, petitioners allege rather that the city's conclusion its guidelines and policies are substantially similar to statewide planning goals is in error. Petitioners do not explain what findings on statewide goals lack support in the record. Similarly, petitioners do not tell us in what fashion the city's goals do not mirror or reflect statewide planning goals. Without more detailed quide posts for our review, we will not pick at the findings and the record to (1) look for places where findings are not supported by substantial evidence and, (2) determine whether the city's goals and policies reflect statewide planning goals. *Deschutes Development Co. v Deschutes County,* 5 Or LUBA 218 (1982).

ASSIGNMENT OF ERROR 8

> "The City erred in not referring this matter to the Planning Commisiion (the citizens and the affected governmental units) for review proceeding from the general identification of the problems and issues to the specific provisions dealing with those issues and for intererelation of this proposal to the inventory, elements and policies, of the adopted Comprehensive Plan and concomitant resolution of the planning issues raised in this case as mandated by Statewide Goals and Guidelines Nos. 1 and 2 and Portland Plan Goal No. 9 and Policy 9.3 and Goal No. 10 and Policy 10.3."

In this assignment of error, petitioners allege the city was obliged to refer the proposed comprehensive plan change to the planning commisiion before action by the city council. Petitioners quote the City of Portland Comprehensive Plan Goal 10, Policy 10.3 as follows:

"10.3 Interim Plan Review and Amendment"

Proposed amendments to the Goals, Policies and Map of the Comprehensive Plan and implementing ordinances will be reviewed by the Planning Commission prior to action by the City Council, consistent with citizen involvement procedures and State law. The Planning Commission will also review the Comprehensive Plan for amendments that consider compliance with goals, objectives and plans adopted by the Metropolitan Service District, and make recommendations to the City Council."

The city's failure to comply with its own plan requires a remand to direct the city to " follow its own procedure," according to Petitioners.

The city directs the Board's attention to Policy 10.4 of the city's plan. That policy provides as follows:

"Request for modification of the comprehensive plan map designations will proceed under the regulations, notification requirements and hearing procedures used for zone change requests. The burden of proof for such a change is placed upon the petitioner seeking such action. The applicant must show that the requested change is (1) consistent and supportive of the appropriate comprehensive plan goals and policies, (2) compatible with the land use pattern established by the comprehensive plan map, (3) in the public interest to grant the petition; the greater the departure from the comprehensive plan map designation, the greater the burden of the applicant, and (4) that the interest is best served by granting the petition at this time and at the requested locations. Rezoning may be considered concurrently with the request for modification of the comprehensive plan map designation."

The City argues this case is controlled by Policy 10.4 and not Policy 10.3 The city followed the requirements of Policy 10.4 when it processed the comprehensive plan change in the same manner as a zone change request. *See* PCC §33.114.040(b);

PCC §33.102.030(a); 050(d) and 060(e). The city advises the comprehensive plan provision cited by petitioners, Policy 10.3, governs the procedure to be followed when revising the plan pursuant to a city council or a planning commission initiated amendment. Policy 10.3 is simply not applicable in this case, according to the city.

The city's reading of its plan is reasonable and not contrary to the express language of the plan. Reading Policy 10.3 and 10.4 together requires adoption of the city's view lest the proceeding in Policy 10.4 be made surplusage. Each portion of the plan should be given effect. Therefore, we adopt the city's construction and deny this assignment of error. *Allius v. Marion County,* 64 Or App 478, 668 p2d 1242 (1983).

ASSIGNMENT OF ERROR 9

> "The adoption of a Commercial Plan designation benefiting a sole developer in the middle of a residential neighborhood violates Statewide Goals Nos. 1, 2, 11, and 12."

Petitioners contend the city adopted the ordinance for the private benefit of the applicant. Petition for Review at 12. Petition for Review at 13. Petitioners further allege the neighborhood is not protected from future commercial development on this property. Part of this allegation includes a claim that the conditions adopted by the city are not affective to limit activity on the property. Petitioners add an allegation that portions of the city's plan to wit: Goal 3, Neighborhoods; Goal 6, Transportation; Goal 7, Energy; are violated. Petitioners do not detail the nature of these violations.

We do not agree with Petitioners' challenge. The decision includes findings and reasons explaining how it is that the

decision complies with the city's plan and, by amendment, the statewide planning goals. There is nothing in the findings or the record to suggest the city has engaged in some sort of contract with the applicant or otherwise breached its duty to act in accordance with adopted standards.[8] Further, because petitioners do not explain how it is in particular that Goals 1, 2, 11 and 14 are certain of the city's goals as noted above are violated, we will not speculate on the nature of such potential violations. *Deschutes Development Co., supra.*

This assignment of error is denied.[9]

ASSIGNMENT OF ERROR 10

> "The city erred in holding that conditional zoning in conjunction with a commercial plan designation adequately protects an established residential neighborhood and its action violated City of Portland Comprehensive Plan Goal Nos. 2 and 3."
>
> "The city erred in adopting conditional zoning as a means of granting a zone change."

In these two assignments of error, petitioners acknowledge conditional zoning is permissible to protect a neighborhood. However, petitioners here allege the conditions imposed " are so pervasive as to be a legal nullity." Petiton for Review at 14.[10]

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[8]The term "spot zoning" is generally used to refer to an arbitrary and unreasonable reclassification where the applicable standards are pushed aside in favor of a kind of agreement to act to the applicant's benefit. *1 R Anderson American Law of Zoning*, 2d S5.08 (2d ed, 1976).

[9]We do not know, for example, whether the allegations made in this assignment of errors about Goals 1 and 2 are the same as those made earlier in Assignment of Error 1 and 3.

[10]It is not clear to us how it is that the conditions are "so pervasive" that they go too far to offer protection to the neighborhood.

We understand Petitioners to argue that should the applicant choose, it could use the same economic enterprise argument used before the city in this proceeding to justify future alterations. In other words, as long as the applicant enjoys a commercial plan and zoning designation on this property, any permitted commercial use is possible, no matter how detrimental to the neighborhood.

Petitioners do not cite us to any authority explaining why the conditions are legally not effective to limit further development of the property.[11] The conditions are claimed by the city to be reasonable. Reasonable conditions will generally be upheld. *1 Rohan Zoning and Land Use Controls,* §5.03 (1984); 39 Op Atty Gen, 467 (1979). Further, conditional zoning is authorized by statute. ORS 227.175(4).

The city code authorizes conditions. PCC 33.102.010 provides:

> "In granting a change in zoning classification of any property, the Council may attach such conditions and requirements to the zone change as the Council deems necessary in the public interest."

In this case, the conditions perform the following functions: (1) restrict the use of the site to a grocery store, (2) allow no further site or building expansion, (3) require a setback from the north property line, (4) prohibit the creation of accessory buildings, (5) prohibit recycling or refuse containers permanently located outside the building, (6) control deliveries, (7) control the time of deliveries, (8) control the height of the building, (9)

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[11]We note in particular that petitioners do not present any authority showing the city's restriction on the property to grocery store use only is illegal. We therefore express no opinion as to whether a zone change may be so conditioned as to limit the property to only one of several permitted uses.

control placement of mechanical equipment serving the building, (10) control exterior lighting, (11) control noise, (12) control parking, (13) control access to the property and require improvements in access.

While it is correct that at some future time, the city council might remove the conditions or allow changes in the use of the property, we do not believe this potential means the city has violated its comprehensive plan or zoning code. That is, as long as the comprehensive plan change and zone change are acted in compliance with the plan,the fact there may be some future land use decisions affecting this property, does not require us to find fault with the city's decision.[12]

ASSIGNMENT OF ERROR 12

"The City Council erred in finding that the applicant met its burden under the Portland Comprehensive Plan Goal 10, Policy 10.4"

In this assignment of error, petitioners argue an applicant seeking a plan and goal change " should be required to meet a substantial burden akin to the exceptions process under Statewide Goal No. 2 to adequately preserve the neighborhood pursuant to Goal 3 of the Portland Comprehensive Plan." [13]

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[12]Petitoners have not provided us with an explanation of how it is that the unamended portions of the plan have been violated. We therefore decline to remand or reverse this decision because of petitioners ' general argument that this change will injure the residential neighborhood adjacent to the store.

[13]Goal 3 of the city's comprehensive plan provides as follows:

"Preserve and reinforce the stability and diversity of the city's neighborhoods while allowing for increased density in order to attract and retain long-term residents and businesses and insure the city's residential quality and economic vitality."

Petitioners say well established neighborhoods, such as the one here, have achieved a balance of campatibility of existing uses. The change proposed is a major change, according to petitioners, and will upset the balance. Petitioners support their claim by arguing that all of the issues present in this case existed at the time of the initial plan adoption, and the only new factor is one of the applicant's creation. Therefore, the propriety of this plan and zone change was decided when the plan was adopted. Any change should be processed with all the formalities and effort required in Policy 10.3 of the plan. That is, this change should be submitted to the planning commission for a complete review. Petitioners argue this change is of such magnitude that the applicant must show some compelling reason for the change.

As the city correctly points out, there is nothing in Policy 10.4 that requires an applicant to satisfy the same criteria as a applicant for a goal exception. We therefore reject the petitioners' claim that some special or extraordinary burden of proof must be met before a plan of change and zone change as enacted here can be granted.

As to the petitioners' argument that the City's Neighborhoods Goal has been violated (Goal 3 and Policy 2.9 of the Urban Develpoment Goal controlling residential neighbor-

hoods) we must reject the argument.[14] Petitioners have not said which of the policies under the city's Goal 3 have been violated. Also, petitioners have not advised how it is the city's conclusion the stability and diversity of the neighborhood will not be jeopardized is wrong. What the petitioners have done, in sum, is present an argument as to why the city should not have chosen to what it did. While the argument addresses the city's comprehensive plan, it does not provide us with a basis for reversal or remand. Petitioners have advised how it is that they city made a poor decision (if petitioners' views are accepted), but LUBA may not reverse even if it were to agree that the city made a poor decision. We may only reverse where we find error.[15] Petitiioners have not provided us with a clear showing of violation of any applicable standard.

The decision of the City of Portland is affirmed.

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[14]The Urban Development Goals state:

"Maintain Portland's role as the major regional employment, population and cultural center through public policies that encourage expanded opportunity for housing and jobs, while retaining the character of established residential neighborhoods and business centers."

Policy 2.9 states:

"Residential Neighborhoods

"Allow for a range of housing types to accomodate increased population growth while improving and protecting the city's residential neighborhoods."

The Neighborhood Goal 3 states:

"Preserve and reinforce the stability and diversity of the city's neighborhoods while allowing for increased density in order to attract and retain long-term residents and businesses and insure the city's residential quality and economic vitality."

[15]*See* ORS 197.835.

ORDINANCE NO. 155609

An Ordinance amending the Comprehensive Plan Map for Tax Lot 7 of Section 8, T1S, R1E, and Lots 2,3, and 4 of Block P, Greenway Add. from High-Density Single-Family to Local Commercial, and changing the zoning from R5 to C3, located at 2855 S.W. Patton Road, under certain conditions, and declaring an emergency.

The City of Portland ordains:

Section 1. The Council finds:

1. The applicants, Wayne Strohecker, Wesley G. Strohecker, National Bank of Oregon, and Michael Fifield, deedholders, seek a Comprehensive Plan Map Amendment from High-Density Single Family to Local Commercial and a Zone Change from R5 to C3, for Tax Lot 7 of Section 8, T1S, R1E, and Lots 2,3, & 4 of Block P. Greenway Add., located at 2855 S.W.Patton Road.
2. An application complying in all respects with all requirements of Title 33, Planning and Zoning, of the Code of the City of Portland and seeking such Comprehensive Plan Map Amendment and Zone Change has been received.
3. Applicants have paid the proper fee for the filing of such application.
4. The City's Hearings Officer by Report and Recommendation dated November 16, 1983 (Planning Commission File No. 7334-PA), after and as a result of a duly authorized and conducted public hearing held November 8, 1983, on said property, has recommended that the Comprehensive Plan Map Amendment and Zone Change be granted, with conditions.
5. That Report and Recommendation of the Hearings Officer was appealed by the Southwest Hills Residential League, J.W. Kamp, and others. The City Council, in accordance with the City's appeal procedures, held a hearing on January 25, 1984, adopted the Hearings Officer's Report with modifications to Condition 2a, and denied the ap-

peal.

6. The notice requirements for public hearings were fulfilled according to law.
7. This rezoning constitutes an amendment of the City's Comprehensive Plan Map. Based upon facts, findings and conclusions of the Hearings Officer's Report and Recommendation, this amendment of the Comprehensive Plan Map from High-Density Single-Family to Local Commercial is found to be in accordance with the Comprehensive Plan.
8. This rezoning is in conformance with the Comprehensive Plan for the City, is in accordance with generally accepted land use planning standards and with applicable City and State legislative enactments as indicated in the Report of the Hearings Officer.

NOW, THEREFORE, the council directs:

a. That the facts, findings, conclusions, and recommendation of the Hearings Officer in P.C. File No. 7334-PA are adopted by City Council.
b. The Comprehensive Plan Map is hereby amended to Local Commercial and the zone of Tax Lot 7 of Section 8, T1S, R1E, and Lots 2,3, and 4 of Block P, Greenway Add. is changed to C3.
c. This Zone Change is granted under the following conditions:
    1) The following conditions recommended by the applicants are included herin:
        a) Use of the site shall be restricted to a grocery store.
        b) Neither the site area nor the building outline shall again be expanded over what is now approved.
        c) The building shall maintain a 35-foot setback from the northerly property line and the area beyond the building shall not be regraded.
        d) No accessory buildings may be located on the site. The existing accessory buildings shall all be removed

prior to occupancy of the addition.

e) No recycling or refuse containers shall be permanently located outside the building.

f) The owners shall require all employees who drive to this site to park in the covered area under the new addition.

g) All delivery vehicles shall enter and exit the site in a forward manner. All loading and unloading must be done on-site.

h) The property owners shall provide additional planting for buffering on City Park property to the west, as required by the Park Bureau.

i) The maximum height of the building shall not exceed the roof profile proposed in this application and may not exceed 15 feet above the grade of S.W. Patton Road pavement, except for skylights.

The footprint of the building shall not exceed that shown on the plans submitted as Exhibit 5.

j) All mechanical equipment shall be relocated from the roof surface to the interior of the building.

k) Exterior lighting shall be as low as feasible and shall not shine onto neighboring residential property.

l) Final plans for the exterior design of the building and for landscaping on the entire site, along with plans for signage and exterior lighting shall be submitted to the Planning Bureau for their review and approval prior to the issuance of Building Permits. To assist the Bureau in determining whether the proposed building, landscaping, signage and lighting are appropriate for this location and adequately protect surrounding residential and park property, the final plans shall be submitted to the Design Commission for their advice prior to Planning Bureau approval. The Commission's review should take place at a meeting of the Commission.

2) The following conditions recommended by the Planning Bureau are included herein:
   a) There shall be no deliveries to the sight by large trucks from 4:30 p.m. to 7:30 p.m. and from 9:00 p.m. to 7:00 a.m.
   b) Signage shall be limited to one wall sign no greater than 100 square feet. Changeable readerboards are not permitted. Onsite directional signs shall be no greater than 4 square feet each.
   c) An entrance to the store shall be provided at the lower level.
   d) Noise from store loudspeakers shall not be audible to any residential property.
   e) All requirements of Chapter 70 of the Building Code relating to soil stability and drainage shall be met.
3) The following conditions recommended by the City's Traffic Engineers and Transportation Planning Section are included herein:
   a) One 40-foot-wide entrance/exit shall be located opposite the intersection of S.W. Old Orchard Road, rather than separate entrances and exit points.
   b) At least 58 parking spaces shall be provided on-site.
   c) A left-turn lane with 30 feet storage southbound and 60 feet storage northbound be installed on S.W. Patton Road at Old Orchard Road by the applicants with the design to be approved by the City Engineer and the City Traffic Engineer.
   d) If room is available and design is acceptable to the City Engineer and the City Traffic Engineer, a right-turn lane shall be provided for the traffic heading south on S.W. Patton Road to turn into the parking lot.
4) The following conditions recommended by the Department of Public Works (Sanitary Engineering) are included herein:
   a) A site drainage plan must be submitted prior to the

issuance of Building Permits, with the plan to be approved by the Bureau of Sanitary Engineering and the Bureau of Buildings, Plumbing Division.

b) The issue of the sewer location on-site and the accompanying issues of maintenance, risk, damage, etc., (as discussed in Exhibit 6e) shall be resolved to the satisfaction of the Bureau of Sanitary Engineering prior to the issuance of any Building Permits for this site.

5) The applicants shall meet all requirements of the Fire Marshal relating to hydrant location and other fire protection measures.

6) The entrance to the under-building parking area shall be blocked to individuals and vehicles when the store is closed.

7) Nothing contained in this approval or these conditions authorize variances to any provisions of the City Code. Any required Variances must be sought through appropriate channels.

8) A Building Permit or an Occupancy Permit must be obtained from the Bureau of Buildings at the Central Permit Center on the first floor of The Portland Building, 1120 S.W. 5th Avenue, 97204, 796-7310, before carrying out this project in order to assure that all conditions imposed here and all requirements of the pertinent Building Codes are met.

d. This order shall not be effective and no change shall be made to the zoning maps until acceptance and recording as provided in Section 33.102.010.

Section 2. The Council declares an emergency exists because there should be no delay in the beneficial use of the above-described property; therefore this ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council, Feb. 16, 1984.

Jewel Lansing
Auditor of the City of Portland
By Edna Cervera Deputy

ORDINANCE NO. 155850

An Ordinance amending Ordinance No. 155609 to include findings regarding the statewide planning goals; affirming, ratifying and incorporating the Council's approval of a comprehensive plan amendment and zone change as set forth in Ordinance No. 155609; and declaring an emergency.

The City of Portland ordains:

Section 1. The Council finds:

1. On February 16, 1984, The Council adopted Ordinance No. 155609 which approved a comprehensive plan map amendment and zone change from High Density Single-Family to Local Commercial requested by Wayne Strohecker, Wesley G. Strohecker, U.S. National Bank of Oregon and Michael Field.
2. The statewide planning goals apply to any amendment to an acknowledged comprehensive plan.
3. Inadvertently omitted from Ordinance No. 155609 were findings analyzing the comprehensive plan map amendment and zone change under the statewide planning goals.
4. It is necessary and in the public interest to amend Ordinance No. 155609 to include the omitted findings.

NOW, THEREFORE, the Council directs:

a. Ordinance No. 155609 is amended to include the following findings regarding the statewide planning goals:

All amendments to the city's Comprehensive Plan Map must be in compliance with the Statewide Planning Goals and Guidelines. Since the city's acknowledged comprehensive plan includes goals and policies substantially similar to all relevant statewide goals and guidelines, compliance with the city's plan (as discussed on pages 8-13 of the Hearings Officer's Report) also indicates compliance with the statewide goals and guidelines.

In summary, the statewide goals were reviewed as follows:

1. Citizen Involvement. (See discussion of city Goal 9 -

Citizen Involvement on pages 12 - 13 of the Hearings Officer's Report.)

2. Land Use Planning. The city's plan and the process established to amend that plan (Policy 10.4) were acknowledged by LCDC. The established process was followed as set out on pages 8 - 15 of the Hearings Officer's Report.

3. Agricultural Lands. This goal is not applicable as there are no agricultural lands affected.

4. Farm and Forest. This goal is not applicable as there are no forest lands affected.

5. Open Spaces, Scenic & Historic Areas, and Natural Resources. No scenic or historic areas or natural resources are affected by this proposal. Regarding open spaces, see discussion of Policy 2.6 (Open Spaces) on page 9 of the Hearings Officer's Report.

6. Air, Water and Land Resources. (See discussion of city Goal 8, Environment, on page 12 of the Hearings Officer's Report.)

7. Areas Subject to Natural Disaster or Hazards. Conditions of approval, including Building Bureau review of construction plans, provide appropriate safeguards to identified potential stormwater and foundation problems. See discussion of City Goal 8, Environment, on page 12 of the Hearings Officer's Report.

8. Recreational Needs. This goal is not applicable as this goal relates to the general planning effort, not individual site use. Also, use of the neighboring park is not impacted. See discussion of Policy 2.6 (Open Space), on page 9 of the Hearings Officer's Report.

9. Economy of State. (See discussion of city Goal 5, Economic Development, on pages 9 - 10 of the Hearings Officer's Report.)

10. Housing. (See discussion of city Goals 3 and 4, Neighborhoods and Housing, on page 9 of the Hearings Officer's Report.)

11. Public Facilities and Services. (See discussion of public services on pages 15 - 16 of the Hearings Officer's

Report.)

12. Transportation. (See discussion of city Goal 6, Transportation, on pages 10 - 12 of the Hearings Officer's Report.)

13. Energy Conservation. (See discussion of city Goal 7 on page 12 of the Hearings Officer's Report.)

14. Urbanization. (See discussion of city Goal 2, Urban Development, on pages 8 - 9 of the Hearings Officer's Report.)

15-19. These statewide goals are not relevant because the site is not located within or near the Willamette River Greenway, any estuarine resources, or coastal shorelands, beaches or dunes.

b. Based on the above findings, and the facts, findings, conclusions and recommendations of the Hearings Office in PC File No. 7334-PA, the Council hereby affirms, ratifies and incorporates herein its approval of a comprehensive plan map amendment from High-Density Single Family to Local Commercial and a zone change from R5 to C3 for Tax Lot 7 of Section 8, TIS, RIE, and Lots 2, 3 and 4 of Block P, GREENWAY ADDITION, as set forth in Ordinance No. 155609.

Section 2. The Council declares an emergency exists because Ordinance No. 155609 has been appealed to the Land Use Board of Appeals and the corrective actions contained in this ordinance must be adopted without delay to allow a speedy resolution of this appeal; therefore, this ordinance shall be in full force and effect from and after its date of passage by the Council.

Passed by the Council, April 19, 1984

Jewel Lansing
Auditor of the City of Portland
By Edna Cevera, Deputy

L. C. D. C. Goal No. 1
CITIZEN INVOLVEMENT

GOAL: To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

The governing body charged with preparing and adopting a comprehensive plan shall adopt and publicize a program for citizen involvement that clearly defines the procedures by which the general public will be involved in the on-going land-use planning process.

The citizen involvement program shall be appropriate to the scale of the planning effort. The program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.

Federal, state and regional agencies and special purpose districts shall coordinate their planning efforts with the affected governing bodies and make use of existing local citizen involvement programs established by counties and cities:

The citizen involvement program shall incorporate the following components:

1. **Citizen involvement** — To provide for widespread citizen involvement.

   The citizen involvement program shall involve a cross-section of affected citizens in all phases of the planning process. As a component, the program for citizen involvement shall include an officially recognized citizen advisory

committee or committees broadly representative of geographic areas and interests related to land use and land use decisions. Citizen advisory committee members shall be selected by an open, well-publicized public process.

The citizen advisory committee shall be responsible for: assisting the governing body with the development of a program that promotes and enhances citizen involvement in land use planning, assisting in the implementation of the citizen involvement program and evaluating the process being used for citizen involvement.

If the governing body wishes to assume the responsibility for development as well as adoption and implementation of the citizen involvement program or to assign such responsibilities to a planning commission, a letter shall be submitted to the Land Conservation and Development Commission for the State Citizen Involvement Advisory Committee's review and recommendation stating the rationale for selecting this option, as well as indicating the mechanism to be used for an evaluation of the citizen involvement program. If the planning commission is used, its members shall be selected by an open, well publicized public process.

2. **Communication** — To assure effective two-way communication with citizens.

   Mechanisms shall be established which provide for effective communication between citizens and elected and appointed officials.

3. **Citizen influence** — To provide the opportunity for citizens to be involved in all phases of the planning process.

   Citizens shall have the opportunity to be involved in the phases of the planning process as set forth and defined in the goal and guidelines for Land Use Planning, including Pre-

paration of Plans and Implementation Measures, Plan Content, Plan Adoption, Minor Changes and Major Revisions in the Plan and Implementation Measures.

4. **Technical Information** — To assure that technical information is available in an understandable form.

   Information necessary to reach policy decisions shall be available in a simplified, understandable form.

   Assistance shall be provided to interpret and effectively use technical information. A copy of all technical information shall be available at a public library or other location open to the public.

5. **Feedback Mechanisms** — To assure that citizens will receive a response from policymakers.

   Recommendations resulting from the citizen involvement program shall be retained and made available for public assessment. Citizens who have participated in this program shall receive a response from policymakers. The rationale used to reach land use policy decisions shall be available in the form of a written record.

6. **Financial Support** — To insure funding for the citizen involvement program.

   Adequate human, financial and informational resources shall be allocated for the citizen involvement program. These allocations shall be an integral component of the planning budget. The governing body shall be responsible for obtaining and providing these resources.

GUIDELINES FOR CITIZEN INVOLVEMENT GOALS

1. **CITIZEN INVOLVEMENT**

A. A program for stimulating citizen involvement should be developed using a range of available media (including television, radio, newspapers, mailings and meetings).

B. Universities, colleges, community colleges, secondary and primary educational institutions and other agencies and institutions with interests in land use planning should provide information on land use education to citizens, as well as develop and offer courses in land use education which provide for a diversity of educational backgrounds in land use planning.

C. In the selection of members for the Citizen Advisory Committee, the following selection process should be observed: citizens should receive notice they can understand of the opportunity to serve on citizen advisory committees; citizen advisory committee appointees should receive official notification of their selection; and, citizen advisory committee appointments should be well publicized.

2. **COMMUNICATION**

A. Newsletters, mailings, posters, mailback questionaires, and other available media should be used in the citizen involvement program.

3. **CITIZEN INFLUENCE**

A. **Data Collection** — The general public through the local citizen involvement programs should have the opportunity to be involved in inventorying, recording, mapping, describing, analyzing and evaluating the elements necessary for the development of the plans.

B. **Plan Preparation** — The general public, through the local citizen involvement programs, should have the opportunity to participate in developing a body of sound information to

identify public goals, develop policy guidelines and evaluate alternative land conservation and development plans for the preparation of the comprehensive land use plans.

C. **Adoption Process** — The general public, through the local citizen involvement programs, should have the opportunity to review and recommend change to the proposed comprehensive land use plans prior to the public hearing process to adopt comprehensive land use plans.

D. **Implementation** — The general public, through the local citizen involvement programs, should have the opportunity to participate in the development, adoption and application of legislation that is needed to carry out a comprehensive land use plan.

The general public, through the local citizen involvement programs, should have the opportunity to review each proposal and application for a land conservation and development action prior to the formal consideration of such proposal and application.

E. **Evaluation** — The general public, through the local citizen involvement programs, should have the opportunity to be involved in the evaluation of the comprehensive land use plans.

F. **Revision** — The general public, through the local citizen involvement programs, should have the opportunity to review and make recommendations on proposed changes in comprehensive land use plans prior to the public hearing process to formally consider the proposed changes.

4. TECHNICAL INFORMATION

A. Agencies that either evaluate or implement public projects or programs (such as, but not limited to: road, sewer, water construction, transportation, subdivision studies and zone changes) should provide assistance to the citizen involvement program. The roles, responsibilities and timeline in the planning process of these agencies should be clearly defined and publicized.

B. Technical information should include, but not be limited to: energy, natural environment, political, legal, economic and social data and places of cultural significance, as well as those maps and photos necessary for effective planning.

5 **FEEDBACK MECHANISM**

A. At the onset of the citizen involvement program, the governing body should clearly state the mechanism through which the citizens will receive a response from the policy-makers.

B. A process for quantifying and synthesizing citizen's attitudes should be developed and reported to the general public.

6. **FINANCIAL SUPPORT**

A. The level of funding and human resourses allocated to the citizen involvement program should be sufficient to make citizen involvement an integral part of the planning process.

L. C. D. C. Goal No. 2
LAND USE PLANNING

GOAL:

PART 1 - PLANNING: To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.

City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS 197.705 through 197.795.

All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable state-wide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. The plans, supporting documents and implementation ordinances shall be filed in a public office or other place easily accessable to the public. The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. Each plan and related implementation measure shall be coordinated with the plans of affected governmental units.

All land use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord

with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances.

Affected Governmental Units — are those local governments, state and federal agencies and special districts which have programs, land ownerships or responsibilities within the area included within the plan.

Comprehensive Plan — as defined in ORS 197.015(4).

Coordinated — as defined in ORS 197.015(4). Note: It is included in the definition of comprehensive plan.

Implementation Measures — are the means used to carry out the plan. These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services.

Plans — as used here encompass all plans which guide land use decisions, including both comprehensive and single purpose plans of cities, counties, state and federal agencies and special districts.

PART II - EXCEPTIONS:

A local government may adopt an exception to a goal when:

(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

(b) The land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

(c) The following standards are met:

(1) Reasons justify why the state policy embodied in the applicable goals should not apply;

(2) Areas which do not require a new exception cannot reasonably accomodate the use;

(3) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
(4) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

COMPATIBLE, as used in subparagraph (4) is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.

A local government approving or denying a proposed exception shall set forth findings of fact and a statement of reasons which demonstrate that the standards for an exception have or have not been met.

Each notice of a public hearing on a proposed exception shall specifically note that a goal exception is proposed and shall summarize the issues in an understandable manner.

Upon review of a decision approving or denying an exception:
(a) The commission shall be bound by any finding of fact for which there is substantial evidence in the record of the local government proceedings resulting in approval or denial of the exception;
(b) The commission shall determine whether the local government's findings and reasons demonstrate that the standards for an exception have or have not been met;
(c) The commission shall adopt a clear statement of reasons which sets forth the basis for the determination that the standards for an exception have or have not been met.

"EXCEPTION" means a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

(c) Complies with standards for an exception.

PART III - USE OF GUIDELINES: Governmental units shall review the guideline set forth for the goals and either utilize the guidelines or develop alternative means that will achieve the goals. All land use plans shall state how the guidelines or alternative means utilized achieve the goals.

Guidelines — are suggested directions that would aid local governments in activating the mandated goals. They are intended to be instructive, directional and positive, not limiting local government to a single course of action when some other course would achieve the same result. Above all, guidelines are not intended to be a grant of power to the state to carry out zoning from the state level under the guise of guidelines. (Guidelines or the alternative means selected by governmental bodies will be part of the Land Conservation and Development Commission's process of evaluating plans for compliance with goals).

GUIDELINES:

1. PREPARATION OF PLANS AND IMPLEMENTATION MEASURES

Preparation of plans and implementation measures should be based on a series of broad phases, proceeding from the very general identification of problems and issues to the specific provisions for dealing with these issues and for interrelating the various elements of the plan.

During each phase opportunities should be provided for review and comment by citizens and affected governmental units.

The various implementation measures which will be used to carry out the plan should be considered during each of the planning phases.

The number of phases needed will vary with the complexity and size of the area, number of people involved, other governmental units to be consulted, and availability of the necessary information.

Sufficient time should be alloted for:

(a) collection of the necessary factual information
(b) gradual refinement of the problems and issues and the alternative solutions and strategies for development
(c) desires and development of broad citizen support
(d) identification and resolution of possible conflicts with plans of affected governmental units.

2. REGIONAL, STATE AND FEDERAL PLAN CONFORMANCE

It is expected that regional, state and federal agency plans will conform to the comprehensive plans of cities and counties. Cities and counties are expected to take into account the regional, state and national needs. Regional, state and federal agencies are expected to make their needs known during the preparation and revision of city and county comprehensive plans. During the preparation of their plans, federal, state and regional agencies are expected to create opportunities for review and comment by cities and counties.

In the event existing plans are in conflict or an agreement cannot be reached during the plan preparation process, then the Land Conservation and Development Commission expects the affected governmental units to take steps to resolve the issues. If an agreement cannot be reached the appeals procedures in ORS Chapter 197 may be used.

3. PLAN CONTENT

A. Factual Basis for the Plan

Inventories and other forms of data are needed as the basis for the policies and other decisions set forth in the plan. This factual base should include data on the following as they relate to the goals and other provisions of the plan:

(1) Natural resources, their capabilities and limitations
(2) Man-made structures and utilities, their location and condition
(3) Population and economic characteristics of the area
(4) Roles and responsibilities of governmental units.

B. Elements of the Plan

The following elements should be included in the plan:

(1) Applicable state-wide planning goals
(2) Any critical geographic area designated by the Legislature
(3) Elements that address any special needs or desires of the people in the area
(4) Time periods of the plan, reflecting the anticipated situation at appropriate future intervals.

All of the elements should fit together and relate to one another to form a consistent whole at all times.

4. FILING OF PLANS

City and county plans should be filed, but not recorded, in the Office of the County Recorder. Copies of all plans should be available to the public and to affected governmental units.

5. MAJOR REVISIONS AND MINOR CHANGES IN THE PLAN IN IMPLEMENTATION MEASURES

The citizens in the area and any affected governmental unit should be given an opportunity to review and comment prior

to any changes in the plan and implementation ordinances. There should be at least 30 days notice of the public hearing on the proposed change. In determining the affected persons to receive notice by mail of proposed changes, renters should be considered among those affected. Also, in the event that all of the property within a single ownership is not included in the area to be changed, the boundary for those to receive notice by mail should be measured fromthe property line and not from the boundary line of the area to be changed.

When adopted, the changes should be suitably noted in a prominent place in the document, filed with the recorder, and copies made available to the public.

A. Major Revisions

Major revisions include land use changes that have widespread and significant impact beyond the immediate area such as quantitative changes producing large volumes of traffic; a qualitative change in the character of the land use itself, such as conversion of residential to industrial use; or a spatial change that affects large areas or many different ownerships. The plan and implementation measures should be revised when public needs and desires change and when development occurs at a different rate than contemplated by the plan. Areas experiencing rapid growth and development should provide for a frequent review so needed revisions can be made to keep the plan up to date; however, major revisions should not be made more frequently than every two years, if at all possible.

The plan and implementation measures should be reviewed at least every two years and a public statement issued on whether any revision is needed. They can be reviewed in their entirety or in major portions. The review should begin with reexamining the date(sic) and problems and continue through the same basic phases as the initial preparation of the plan and implementation measures.

B. Minor Changes

Minor changes, i.e., those which do not have significant effect beyond the immediate area of the change, should be based on special studies or other information which will serve as the factual basis to support the change. The public need and justification for the particular change should be established. Minor changes should not be made more frequently than once a year, if at all possible.

6. IMPLEMENTATION MEASURES

The following types of measures should be considered for carrying out plans:

A. Management Implementation Measures:

(1) Ordinances controlling the use and construction on the land such as building codes, sign ordinances, subdivision and zoning ordinances. ORS Chapter 197 requires that the provisions of the zoning and subdivision ordinances conform to the comprehensive plan.

(2) Plans for public facilities that are more specific than those included in the comprehensive plan. They show size, location and capacity serving each property but are not as detailed as construction drawings.

(3) Capital improvement budget which sets out the projects to be constructed during the budget period.

(4) State and federal regulations affecting land use.

(5) Annexations, consolidations, mergers and other reorganization measures.

B. Site and Area Specific Implementation Measures

(1) Building permits, septic tank permits, driveway permits, etc.; the review of subdivisions and land partitioning applications, the changing of zones and granting of conditional uses, etc.

(2) The construction of public facilities (schools, roads, water lines, etc.)

(3) The provision of land-related public services such as fire and police.

(4) The awarding of state and federal grants to local governments to provide these facilities and services.

(5) Leasing of public lands.

7. USE OF GUIDELINES FOR THE STATE-WIDE PLANNING GOALS

Guidelines for most state-wide planning goals are found in two sections — planning and implementation. Planning guidelines relate primarily to the process of developing plans that incorporate the provisions of the goals. Implementation guidelines should relate primarily to the process of carrying out the goals once they have been incorporated into the plans. Techniques to carry out the goals and plans should be considered during the preparation of the plan.